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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 GILBERTO AVILA,) Case No. EDCV 17-1440-JPR
12)
13 Plaintiff,)
14) MEMORANDUM DECISION AND ORDER
15 v.) AFFIRMING COMMISSIONER
16)
17 NANCY A. BERRYHILL, Acting)
18 Commissioner of Social)
19 Security,)
20)
21 Defendant.)
22)
23)
24)
25)
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27)
28)

29 I. PROCEEDINGS

30 Plaintiff seeks review of the Commissioner's final decision
31 denying his application for Social Security supplemental security
32 income benefits ("SSI"). The parties consented to the
33 jurisdiction of the undersigned under 28 U.S.C. § 636(c). The
34 matter is before the Court on the parties' Joint Stipulation,
35 filed February 28, 2018, which the Court has taken under
36 submission without oral argument. For the reasons stated below,
37 the Commissioner's decision is affirmed.
38

1 **II. BACKGROUND**

2 Plaintiff was born in 1966. (Administrative Record ("AR")
3 31, 239, 241.) He received a GED (AR 58, 265) and worked as a
4 hairdresser, waiter, and community outreach worker (AR 265, 284,
5 370).

6 On January 10, 2013, Plaintiff applied for SSI, alleging
7 that he had been unable to work since June 1, 1996,¹ because of
8 stroke, heart problems, learning disability, posttraumatic stress
9 disorder, and mental illness. (AR 21, 241-49, 264.) After his
10 application was denied initially and on reconsideration (see AR
11 101-03, 119-20), he requested a hearing before an Administrative
12 Law Judge (AR 137). Hearings were held on June 5 and December
13 16, 2015.² (AR 39-82.) Plaintiff, who was represented by
14 counsel, testified (AR 41-43, 51-58, 71-78, 886-95), as did a
15 medical expert (AR 43-50, 875-86) and a vocational expert (AR 58-
16 63, 895-900).³ In a written decision issued January 13, 2016,

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18 ¹ Plaintiff listed June 1, 1996, as his disability-onset
19 date (AR 241), but the actual date of his stroke is unclear (see
20 AR 46 (medical-expert testimony that "I don't think we know
21 exactly when [the stroke] happened")). The record gives
22 estimated dates between 1995 and 1998. (See AR 71 (Plaintiff's
23 attorney giving date as "1996 or '98" and remarking, "[i]t's sort
24 of unclear"), 369 (Plaintiff "has been having difficulty since
25 1995"), 420 (consulting examiner reporting date as "1998" with
26 possible second stroke in 2005).) Contemporaneous medical
27 documentation is not in the AR.

28 ² The parties erroneously give the hearing dates as June 5
and December 16, 2016, which would have been after the ALJ's
decision was issued. (See J. Stip. at 2.)

³ AR 48 is labeled as page 10 of the December 16, 2015
hearing transcript, AR 49 is labeled as page 16, AR 50 as page
17, and AR 51 as page 20. (See AR 48-51.) On September 20,
2018, in response to this Court's order, the parties supplemented
the AR by lodging the full transcript of the December 16, 2015
hearing. (See AR 871-903.) They agreed that no supplemental

1 the ALJ found Plaintiff not disabled. (AR 18-38.) Plaintiff
2 sought Appeals Council review (AR 238, 336-37), which was denied
3 on May 19, 2017 (AR 4-9). This action followed.

4 **III. STANDARD OF REVIEW**

5 Under 42 U.S.C. § 405(g), a district court may review the
6 Commissioner's decision to deny benefits. The ALJ's findings and
7 decision should be upheld if they are free of legal error and
8 supported by substantial evidence based on the record as a whole.
9 See Richardson v. Perales, 402 U.S. 389, 401 (1971); Parra v.
10 Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial evidence
11 means such evidence as a reasonable person might accept as
12 adequate to support a conclusion. Richardson, 402 U.S. at 401;
13 Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007). It
14 is more than a scintilla but less than a preponderance.
15 Lingenfelter, 504 F.3d at 1035 (citing Robbins v. Soc. Sec.
16 Admin., 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether
17 substantial evidence supports a finding, the reviewing court
18 "must review the administrative record as a whole, weighing both
19 the evidence that supports and the evidence that detracts from
20 the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715,
21 720 (9th Cir. 1998). "If the evidence can reasonably support
22 either affirming or reversing," the reviewing court "may not
23 substitute its judgment" for the Commissioner's. Id. at 720-21.
24 Courts "may not reverse an ALJ's decision on account of an error
25 that is harmless," that is, "inconsequential to the ultimate

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27 briefing was required because they had not relied on any
28 previously missing pages of the transcript in making their
arguments. (See J. Rep. at 2.) The AR thus now appears to be
complete.

nondisability determination." Molina v. Astrue, 674 F.3d 1104, 1111, 1115 (9th Cir. 2012) (citation omitted).

IV. THE EVALUATION OF DISABILITY

People are "disabled" for purposes of receiving Social Security benefits if they are unable to engage in any substantial gainful activity owing to a physical or mental impairment that is expected to result in death or has lasted, or is expected to last, for a continuous period of at least 12 months. 42 U.S.C. § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir. 1992).

A. The Five-Step Evaluation Process

The ALJ follows a five-step evaluation process to assess whether a claimant is disabled. 20 C.F.R. § 416.920(a)(4); Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995) (as amended Apr. 9, 1996). In the first step, the Commissioner must determine whether the claimant is currently engaged in substantial gainful activity; if so, the claimant is not disabled and the claim must be denied. § 416.920(a)(4)(i).

If the claimant is not engaged in substantial gainful activity, the second step requires the Commissioner to determine whether the claimant has a "severe" impairment or combination of impairments significantly limiting his ability to do basic work activities; if not, the claimant is not disabled and his claim must be denied. § 416.920(a)(4)(ii).

If the claimant has a "severe" impairment or combination of impairments, the third step requires the Commissioner to determine whether the impairment or combination of impairments meets or equals an impairment in the Listing of Impairments set

1 forth at 20 C.F.R. part 404, subpart P, appendix 1; if so,
2 disability is conclusively presumed. § 416.920(a)(4)(iii).

3 If the claimant's impairment or combination of impairments
4 does not meet or equal an impairment in the Listing, the fourth
5 step requires the Commissioner to determine whether the claimant
6 has sufficient residual functional capacity ("RFC")⁴ to perform
7 his past work; if so, he is not disabled and the claim must be
8 denied. § 416.920(a)(4)(iv). The claimant has the burden of
9 proving he is unable to perform past relevant work. Drouin, 966
10 F.2d at 1257. If the claimant meets that burden, a prima facie
11 case of disability is established. Id. If that happens or if
12 the claimant has no past relevant work, the Commissioner then
13 bears the burden of establishing that the claimant is not
14 disabled because he can perform other substantial gainful work
15 available in the national economy. § 416.920(a)(4)(v); Drouin,
16 966 F.2d at 1257. That determination comprises the fifth and
17 final step in the sequential analysis. § 416.920(a)(4)(v);
18 Lester, 81 F.3d at 828 n.5.

19 B. The ALJ's Application of the Five-Step Process

20 At step one, the ALJ found that Plaintiff had not engaged in
21 substantial gainful activity since January 10, 2013, the
22 application date. (AR 23.) At step two, he concluded that
23 Plaintiff had the severe impairments of "cerebellar infarct with
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26 ⁴ RFC is what a claimant can do despite existing
27 exertional and nonexertional limitations. § 416.945; see Cooper
28 v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989). The
Commissioner assesses the claimant's RFC between steps three and
four. Laborin v. Berryhill, 867 F.3d 1151, 1153 (9th Cir. 2017)
(citing § 416.920(a)(4)).

1 residual hemiataxia."⁵ (Id.) He found Plaintiff's impairments
2 of "glaucoma" and "depressive disorder and anxiety disorder" not
3 severe. (Id.) At step three, he determined that Plaintiff's
4 impairments did not meet or equal a listing. (AR 24.) At step
5 four, the ALJ found that Plaintiff's "statements concerning the
6 intensity, persistence[,] and limiting effects of [his] symptoms
7 [were] not entirely credible" (AR 25) and concluded that he had
8 the RFC to perform "a full range of work at all exertional
9 levels" subject to the following exceptions:

10 [N]o limitation lifting and/or carrying; no limitation
11 standing and/or walking; does not require a cane in order
12 to stand or ambulate; frequently bend, stoop, kneel,
13 crouch, and crawl; occasionally climb and balance; and
14 never climb ladders, ropes, or scaffolds, or work at
15 unprotected heights due to residual hemiataxia.

16 (AR 24.) Plaintiff did not have past relevant work. (AR 31.)
17 At step five, the ALJ found that given Plaintiff's age,
18 education, work experience, and RFC, there were jobs he could
19 perform existing in significant numbers in the national economy.
20 (Id.) Thus, the ALJ found Plaintiff not disabled. (AR 32.)
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26 ⁵ Hemiataxia is a loss of muscle control affecting one
27 side of the body and may result from stroke or cerebellar injury.
28 See Hemiataxia, The Free Dictionary-Medical Dictionary,
<https://medical-dictionary.thefreedictionary.com/hemiataxia> (last
visited Sept. 28, 2018).

1 **V. DISCUSSION⁶**

2 Remand Is Not Warranted Based on the ALJ's Step-Two
3 Determination Concerning Plaintiff's Mental Impairments

4 Plaintiff argues that the ALJ improperly ignored the
5 moderate limitations assessed by psychologists Margaret Donohue
6 and Robin Rhodes Campbell, whose opinions the ALJ afforded "great
7 weight" in other respects, and as a result erroneously determined
8 his mental impairments to be nonsevere at step two. (See J.
9 Stip. at 5-13, 19-20.) As discussed below, the ALJ did not
10 ignore the opinions of Drs. Donohue and Campbell, and even if he
11 did err in failing to adequately explain his reasons for
12 rejecting the limitations they opined, any such error was
13 harmless. Remand is therefore unwarranted.

14 1. Applicable law

15 The step-two inquiry is "a de minimis screening device to
16 dispose of groundless claims" when a claimant's impairments are
17 not severe. Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir.
18 1996). "An impairment or combination of impairments may be found
19 'not severe only if the evidence establishes a slight abnormality
20 that has no more than a minimal effect on an individual's ability
21 to work.'" Webb v. Barnhart, 433 F.3d 683, 686 (9th Cir. 2005)
22 (quoting Smolen, 80 F.3d at 1290 (emphasis in original)). A

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24 ⁶ In Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018), the
25 Supreme Court recently held that ALJs of the Securities and
26 Exchange Commission are "Officers of the United States" and thus
27 subject to the Appointments Clause. To the extent Lucia applies
28 to Social Security ALJs, Plaintiff has forfeited the issue by
failing to raise it during his administrative proceedings. (See
AR 4-9, 39-82, 238, 336-37; J. Stip. at 5-13, 19-20); Meanel v.
Apfel, 172 F.3d 1111, 1115 (9th Cir. 1999) (as amended)
(plaintiff forfeits issues not raised before ALJ or Appeals
Council).

1 court must determine whether substantial evidence in the record
2 supported the ALJ's finding that a particular impairment was not
3 severe. Id. at 687.

4 The ALJ may disregard a physician's opinion regardless of
5 whether it is contradicted. Magallanes v. Bowen, 881 F.2d 747,
6 751 (9th Cir. 1989); see also Carmickle v. Comm'r, Soc. Sec.
7 Admin., 533 F.3d 1155, 1164 (9th Cir. 2008). An ALJ may accept
8 some portions of a medical source's opinion and reject others.
9 See Magallanes, 881 F.2d at 754 (ALJ properly accepted doctor's
10 objective findings but rejected his opinion as to disability
11 onset date); see also Stewart v. Colvin, No. 1:13-cv-00187-BAM.,
12 2014 WL 3615237, at *6 (E.D. Cal. July 21, 2014) (expressly
13 rejecting plaintiff's contention that ALJ "cannot 'pick and
14 choose' among portions of medical opinions"). When the relevant
15 opinion or portion of it is contradicted by other evidence in the
16 record, the ALJ need provide only a "specific and legitimate"
17 reason supported by "substantial evidence" in order to reject it.
18 See Rollins v. Massanari, 261 F.3d 853, 856 (9th Cir. 2001)
19 (citation omitted). An ALJ need not recite "magic words" to
20 reject a physician's opinion or a portion of it; the court may
21 draw "specific and legitimate inferences" from the ALJ's opinion.
22 Magallanes, 881 F.2d at 755.

23 The Court must consider the ALJ's decision in the context of
24 "the entire record as a whole," and if the "'evidence is
25 susceptible to more than one rational interpretation,' the ALJ's
26 decision should be upheld." Ryan v. Comm'r of Soc. Sec., 528
27 F.3d 1194, 1198 (9th Cir. 2008) (citation omitted).

1 2. Relevant background

2 a. *Plaintiff's neurological condition*

3 Plaintiff had a stroke in or around 1996⁷ and an aortic-
4 valve replacement. (See AR 379, 382.) He reported that the
5 stroke left him with left-side weakness, dizziness, balance
6 problems, vision loss in his right eye, and mental-health
7 difficulties. (See, e.g., AR 369, 382, 389.) Later CT scans
8 confirmed changes in Plaintiff's brain from "old infarcts." (See
9 AR 368 (reporting 2008 scan showing "low-density changes of the
10 left cerebral hemisphere and right cerebrum with atrophy
11 representing old infarcts" and "old left frontal lobe infarct"
12 but no acute damage), 389 (2013 scan showing "[c]hronic
13 postinfarction encephalomalacia involving the cerebellar
14 hemispheres bilaterally" but "[n]o acute abnormality").)

15 On June 6, 2013, Plaintiff saw internal-medicine specialist
16 Dr. Ruben Ustaris for a consulting exam. (AR 379-83.) He
17 complained of "constant dizziness," "falling," "loss of memory
18 function," difficulty "understanding what he reads or hears," and
19 "severe depression." (AR 379.) Dr. Ustaris noted that Plaintiff
20 walked with a "long wooden rod" but was capable of walking
21 without it, although he tended to "grab the wall after he
22 step[ped] to maintain balance." (AR 380.) He observed that
23 Plaintiff's "left extremities are slightly weaker compared to the
24 right" but graded both at "5/5 in terms of motor strength." (AR
25 381.) He opined that Plaintiff needed "a cane for balance only
26 to prevent falls" while walking, could "bend, stoop, kneel and

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28 ⁷ The exact date of Plaintiff's stroke is unclear. See
supra note 1.

1 crawl frequently but climb and balance occasionally," and could
2 not "work at unprotected heights because of history of dizziness
3 and problems with equilibrium." (AR 382.) He did not assess any
4 other restrictions. (Id.)

5 On August 5, 2013, Plaintiff met with neurologist Robert
6 Moore for a consulting exam. (AR 420-24.) He arrived on time
7 and "was able to drive himself to the office." (AR 420.) He
8 told Dr. Moore that "in 1998, while living in Mexico," he
9 "suffered what sounds like an embolic infarction related to
10 bacterial endocarditis." (Id.) He also reported a possible
11 second stroke in 2005. (Id.)

12 Plaintiff complained to Dr. Moore primarily of problems with
13 balance that caused him to use a cane and secondarily of "mild
14 weakness in his left leg." (Id.) He said he had some difficulty
15 "performing fine coordinated movements with the left fingers,"
16 felt that "his vision was getting worse," had been diagnosed with
17 depression with psychotic features, and believed that his memory
18 and thinking were "getting worse." (AR 420-21.) He stated that
19 he was "afraid to drive" despite having apparently driven himself
20 to the appointment. (AR 421.)

21 Dr. Moore performed a mental-status examination in which
22 Plaintiff misstated the day of the week but was "otherwise alert
23 and oriented to person and place." (AR 422.) He correctly
24 identified the President, was able to calculate two plus five,
25 and "followed three step commands and repeated two reversed
26 digits." (Id.) His object recall was "one out of three in five
27 minutes and two out of three with assistance." (Id.) He did not
28 attempt to subtract seven from 100. (Id.) Dr. Moore opined that

1 Plaintiff's "general fund of knowledge appeared to be fair."
2 (Id.)

3 Dr. Moore further observed that Plaintiff's speech was
4 "normal," and he had "no difficulty in naming objects," "spoke in
5 grammatically correct sentences," and "was able to read and write
6 without difficulty." (Id.) Nothing indicates that an
7 interpreter or translator was present, and the exam was
8 apparently conducted in English. (See generally AR 420-24.)

9 Physical testing showed that Plaintiff had mild difficulty
10 in fine coordinated movement with his left fingers, "a bit more
11 than a mild left hemiatonic gait," and weakened grip strength in
12 his left hand. (AR 422.) The exam findings were otherwise
13 unremarkable. (See generally AR 421-23.) Dr. Moore diagnosed
14 him with "[c]erebellar infarct with residual hemiatonia,"
15 "[h]istory of depression," and "[c]ognitive impairment possibly
16 secondary" to the first two diagnoses. (AR 423.) He opined that
17 Plaintiff could stand and walk "at least two hours out of an
18 eight-hour day without an assistive device," "sit in an
19 unrestricted manner," and "occasionally bend and stoop." (Id.)
20 He could not "climb, balance, or work at heights" and "would have
21 slight difficulty operating foot controls with the left leg."
22 (Id.) He could "frequently push and pull" and "perform frequent
23 simple gripping and frequent distal fine coordinated movements
24 with the left hand and fingers." (Id.) "Because of his balance
25 issues," he could "intermittently lift and carry 30 pounds and
26 more frequently lift and carry 15 pounds." (Id.)

27 With respect to nonexertional limitations, Dr. Moore
28 observed that "a component" of Plaintiff's cognitive complaints

1 "may be related to his left frontal infarct, but there certainly
2 may be a component associated with an underlying depression."
3 (Id.) He opined that Plaintiff would be "able to follow simple
4 commands and perform simple tasks" but "would likely have slight
5 difficulty following complex commands and performing complex
6 tasks." (AR 423-24.) He declined to assess any more specific or
7 restrictive nonexertional limitations on the understanding that
8 Plaintiff would "be having psychometric tests performed for SSI
9 purposes." (AR 423.)

10 b. *Psychological exams by Drs. Donohue and*
11 *Campbell*

12 On May 25, 2013, Plaintiff met with psychologist Donohue for
13 a consulting exam. (AR 368-74.) He presented his valid
14 California driver's license. (AR 368; see also AR 435 (copy of
15 Plaintiff's driver's license valid through Feb. 4, 2015).) He
16 complained of "posttraumatic stress disorder," "mood swings,"
17 "depression," and "anger," which he attributed to the stroke or
18 other "brain trauma" from "1995." (AR 369.) He apparently told
19 Dr. Donohue that he was "not in current [psychiatric] treatment,"
20 had "had suicidal thoughts" in the past but was "not suicidal
21 now" and had "never made an attempt," and "hear[d] noises and
22 [saw] shadows of people walking." (Id.) Dr. Donohue repeatedly
23 noted difficulty in obtaining an accurate history from Plaintiff.
24 (See AR 368-69.)

25 Dr. Donohue observed that Plaintiff's motor activity was
26 "within normal limits," further noting that "[t]here is motor
27 slowing but some of that appears intentional." (AR 370.) His
28 speech was "clear and fluent in English" and, although she was

1 "translating into Spanish," it was "not always helping." (Id.)
2 His "[i]nterview behavior showed resignation formulas and easily
3 giving up," and he "put[] forth a really marginal effort." (AR
4 371.) He reported the year and the day of the week incorrectly
5 and "d[id] not know" the month, date, season, name of the office,
6 or what county it was in. (Id.) He was not able to spell the
7 word "mundo" and told Dr. Donohue he could not spell "cat" in
8 reverse order. (Id.) He could correctly subtract seven from
9 100. (Id.) Dr. Donohue opined that Plaintiff's "[i]ntellect is
10 not able to be adequately assessed due to marginal effort."
11 (Id.)

12 Dr. Donohue attempted to administer the Trail Making Test,
13 parts A and B,⁸ but Part A "was aborted at 15 seconds" when
14 Plaintiff claimed he could not go further. (AR 372.) He "was
15 able to pass the training item" for that test. (Id.) Dr.
16 Donohue also administered the Wechsler Adult Intelligence Scale –
17 Fourth Edition,⁹ which yielded a composite IQ score of 47. (Id.)
18 Dr. Donohue did "not believe these scores [were] valid." (AR
19 373.) She attempted to administer the Wechsler Memory Scale –
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21 ⁸ The Trail Making Test is a timed test used to assess
22 cognition and screen for dementia. See Administration, Scoring
23 and Interpretation of the Trail Making Test, VeryWellHealth,
24 [https://www.verywellhealth.com/dementia-screening-tool-the-trail-](https://www.verywellhealth.com/dementia-screening-tool-the-trail-making-test-98624)
making-test-98624 (last visited Sept. 28, 2018).

25 ⁹ The Wechsler Adult Intelligence Scale – Fourth Edition
26 measures intelligence in adults and older adolescents. See The
27 Wechsler Adult Intelligence Scale, VeryWellMind, [https://](https://www.verywellmind.com/the-wechsler-adult-intelligence-scale-2795283)
28 [www.verywellmind.com/the-wechsler-adult-intelligence-](https://www.verywellmind.com/the-wechsler-adult-intelligence-scale-2795283)
scale-2795283 (last visited Sept. 28, 2018). It provides scores
of an examinee's verbal comprehension, perceptual reasoning,
working memory, and processing speed as well as his overall IQ
and an index of his general ability. See id.

1 Fourth Edition,¹⁰ but the test was aborted because Plaintiff
2 "report[ed] he [was] too confused to be able to do this and he
3 cannot repeat back anything." (Id.)

4 Dr. Donohue diagnosed Plaintiff with major depressive
5 disorder, cognitive disorder not otherwise specified "with
6 unknown degree of impairment because of poor effort on testing,"
7 and a likely borderline to mild level of intellectual impairment.
8 (Id.) She opined that his stroke, as "verified by CT scan,"
9 would not cause him to "fail[] preschool level items on multiple
10 areas." (Id.) She opined that he "would be able to understand,
11 remember, and carry out short, simplistic instructions with mild
12 difficulty." (Id.) He "should have no difficulty to make
13 simplistic work-related decisions without special supervision."
14 (AR 374.) He "may have mild difficulty to comply with job rules
15 . . . due to impulsivity with frontal lobe disorder" and "would
16 have moderate difficulty to maintain persistence and pace in a
17 normal workplace setting." (Id.) She noted that he "was
18 socially inappropriate" with her in that he gave up on or refused
19 to complete several examination items, and she was therefore "not
20 able to assess his ability" to interact with supervisors and
21 coworkers. (Id.) She was not able to assess his GAF score.¹¹

23 ¹⁰ The Wechsler Memory Scale – Fourth Edition assesses
24 different types of memory in adults, including auditory, visual,
25 logical, spatial, working, immediate, and delayed. See, e.g.,
26 Sample Interpretive Report of WMS-IV Testing, Pearson Clinical,
[http://images.pearsonclinical.com/images/Products/WMS-IV/
WMS-IV_Writer_Report_Sofia_Estrange_September_2011.pdf](http://images.pearsonclinical.com/images/Products/WMS-IV/WMS-IV_Writer_Report_Sofia_Estrange_September_2011.pdf) (last
visited Sept. 28, 2018).

27 ¹¹ GAF stands for Global Assessment of Functioning and is
28 used to rate how seriously symptoms of mental illness interfere
with a person's day-to-day life. See What Is the Global

1 (AR 373.) She further observed that Plaintiff's claimed level of
2 memory impairment and his walking into a wall as he was leaving
3 her office were inconsistent with his having a valid driver's
4 license. (AR 374.)

5 On August 5, 2013, the same day as his visit with Dr. Moore
6 (to which he had evidently driven himself and at which he had
7 presented only mild – at most – mental difficulties) (AR 420-24),
8 Plaintiff met with psychologist Campbell for a consulting exam
9 (AR 428-34). He reported "difficulty processing instructions,"
10 "memory loss," "balance problems," "left-sided weakness," and
11 "inability to express his thoughts." (AR 429.) He attributed
12 those problems to a stroke in "1998." (Id.) He complained that
13 he could not focus well enough to read or to learn his phone
14 number or address. (Id.) He claimed that he had been "hear[ing]
15 voices and see[ing] shadows since the stroke" but was "vague and
16 evasive" when Dr. Campbell asked for more specific information.
17 (Id.) He expressed worry that "people are 'doing bad things to
18 me'" but "could not give any time in the last 15 years that this
19 had happened." (Id.) He also reported poor appetite but had
20 apparently gained 20 pounds in the three months before the exam.
21 (Id.) Dr. Campbell nevertheless rated him a "fair historian."
22 (Id.) She also rated his speech as "fluent with normal volume,
23 rate and rhythm" and noted that his "[e]xpressive and receptive
24 language appeared to be intact." (AR 431.) Plaintiff declined
25 the services of an interpreter and apparently participated in the

27 Assessment of Functioning (GAF) Scale?, WebMD, [https://](https://www.webmd.com/mental-health/gaf-scale-facts)
28 www.webmd.com/mental-health/gaf-scale-facts (last visited Sept.
28, 2018).

1 exam in English without difficulty. (AR 429.)

2 Dr. Campbell administered the WAIS-IV and the WMS-IV tests.
3 (AR 431-32.) She observed that Plaintiff's "manner was notable
4 for some evidence of exaggeration and dissimulation." (AR 430.)
5 More specifically, "[w]hen presented with even very simple tasks,
6 he put his hands over his eyes and exclaimed, 'Oh God.'" (Id.)
7 Plaintiff scored at or below the second percentile on both tests,
8 indicating "extremely low" functioning. (AR 431-32.) Dr.
9 Campbell warned, however, that the test results were "not
10 considered to be a reliable estimation of [Plaintiff's] cognitive
11 or intellectual functioning" because of "very poor effort." (AR
12 432.) She diagnosed him with "Depressive Disorder, NOS," and
13 "Anxiety Disorder, NOS," ruled out diagnoses of "Psychotic
14 Disorder, NOS," and "Factitious Disorder with [p]sychological
15 [s]ymptoms," and rated his GAF score at 67, indicating "some mild
16 symptoms" or "some difficulty in social, occupational, or school
17 functioning" but "generally functioning pretty well," with "some
18 meaningful interpersonal relationships." (AR 433); see also What
19 Is the Global Assessment of Functioning (GAF) Scale?, WebMD,
20 [https://www.webmd.com/](https://www.webmd.com/mental-health/gaf-scale-facts)
21 [mental-health/gaf-scale-facts](https://www.webmd.com/mental-health/gaf-scale-facts) (last visited Sept. 28, 2018).

22 Based on the exam, Dr. Campbell opined that Plaintiff "would
23 have no impairment in understanding, remembering, and carrying
24 out short, simple instructions." (AR 433.) His "ability to
25 understand, remember, and carry out detailed instructions" was
26 "mildly impaired." (AR 433.) She found Plaintiff "unimpaired in
27 his ability to make judgments on simple, work-related decisions"
28 but noted that he "would have moderate difficulty in relating

1 appropriately to the public, supervisors, and co-workers." (Id.)
2 She also found moderate impairment in his "ability to withstand
3 the stress and changes associated with an eight-hour workday and
4 day-to-day work activities." (Id.) She did not assess any
5 limitations in maintaining concentration, persistence, or pace.
6 (Id.)

7 *c. Medical-expert testimony*

8 Impartial medical expert Dr. James Haynes,¹² a neurologist
9 (AR 867), evaluated the longitudinal record and testified at the
10 December 16, 2015 hearing (see AR 875-86). He noted that
11 Plaintiff had had a "stroke in the cerebellum" and "aortic valve"
12 replacement that had left him with vision and balance problems.
13 (AR 876-77.) He opined that the medical evidence of those
14 physical problems supported limitations on ladders and heights
15 (AR 877), standing, walking, lifting, and carrying (AR 880-81);
16 further, "it probably [would be] reasonable [for him] to use a
17 walking stick of some kind." (AR 877; see also AR 882.)

18 With respect to Plaintiff's alleged cognitive impairments,
19 Dr. Haynes agreed that he had "abnormalities in the cerebellum"
20 (AR 877) but observed that "[t]here's a lot of psychiatric issues
21 here," referring to consulting examiners' descriptions of
22 "impaired cognition" and "question[able] effort." (AR 876.) The
23 ALJ expressly asked if there might be a "neurological basis" for
24 Plaintiff's "severe [mental-health] complaints," "extremely low
25 IQ," and "major cognitive deficits with some extreme limitations"
26

27 ¹² Dr. Haynes's name is spelled "Haines" in the hearing
28 transcript (see, e.g., AR 43), but his curriculum vitae gives his
name as "James M. Haynes" (see AR 867).

1 as opposed to the consulting examiners' suspicions of
2 malingering. (AR 878; see also AR 879 ("[C]ould there have been
3 brain damage that is leading to this? Maybe he's not exaggerating
4 . . . [maybe] [h]e's given forth his full effort.")) Dr. Haynes
5 pointedly answered, "I don't think that it's true" and further
6 opined that "the effort issues, I mean, worse than preschooler
7 . . . I mean that's kind of impossible." (AR 879; see also AR
8 880 (Dr. Haynes testifying that Plaintiff's having "perform[ed]
9 worse than your average preschooler" did not "make any sense" and
10 was "not explained by neuro imaging").)

11 Plaintiff's counsel cross-examined Dr. Haynes but spent most
12 of his questioning on how long Plaintiff could stand and walk.
13 (See AR 882-83.) In his single question related to his client's
14 alleged cognitive impairments, he asked Dr. Haynes whether he had
15 seen "any notations about [Plaintiff's] exaggerating?" (AR 884.)
16 Haynes replied, "[n]ot exactly" but observed that his "depression
17 [was] probably pretty significant" and could cause "pseudo
18 dementia." (Id.) Plaintiff's counsel did not follow up on that
19 statement and had no further questions for the doctor. (Id.; see
20 also AR 885.)

21 3. Analysis

22 The ALJ found no severe mental impairment at step two and
23 included no mental limitations in Plaintiff's RFC. (See AR 23-
24 24.) Plaintiff argues that the ALJ's failure to give specific
25 reasons for "ignor[ing]" the mild to moderate cognitive
26 limitations opined by Drs. Donohue and Campbell amounts to
27 reversible error. (See J. Stip. at 5.) He is incorrect, for the
28 reasons set forth below.

1 a. *The ALJ did not err in finding Plaintiff's*
2 *mental-health impairments not severe at step*
3 *two*

4 At step two, the ALJ found that Plaintiff's "medically
5 determinable impairments of depressive disorder and anxiety
6 disorder," considered alone or together, did not "cause more than
7 minimal limitation" on his "ability to perform basic mental work
8 activities." (AR 23.) He thus classified them as "nonsevere."
9 (*Id.*) The ALJ gave "great weight" to Drs. Donohue's and
10 Campbell's opinions that Plaintiff "gave poor effort, the testing
11 was invalid, and [his] symptoms were disproportionate to the
12 objective findings." (AR 30.) Despite Plaintiff's apparent
13 belief to the contrary (*see* J. Stip. at 11-12), he did not give
14 great weight to any of the functional limitations opined by
15 either doctor (*see* AR 30; *see also generally* AR 27-31). Indeed,
16 the paragraphs affording "great weight" to the portions of their
17 opinions bearing on Plaintiff's credibility (AR 30) make that
18 clear by observing that his symptoms were "disproportionate to
19 the objective findings" in a way that "would not be expected
20 following [his] stroke" and that he gave "vague and evasive
21 answers" and engaged in "exaggeration and dissimulation" when
22 examined by Dr. Campbell (*id.*). An ALJ may properly find that a
23 plaintiff's repeated failure to give full effort during an exam
24 undermines the alleged limiting effect of his symptoms. *See*
25 *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002).

26 Moreover, the ALJ provided ample support elsewhere in his
27 decision for implicitly rejecting the mental restrictions found
28 by Drs. Campbell and Donohue. (*See generally* AR 28-31.)

1 Although the decision falls just short of an explicit statement
2 of his reasoning, reviewing courts "are not deprived of our
3 faculties for drawing specific and legitimate inferences from the
4 ALJ's opinion." Magallanes, 881 F.2d at 755 (ALJ not required to
5 recite "incantation" such as "I reject [this doctor's] opinion
6 about [this issue] because"). He cited Dr. Campbell's
7 opinion for the proposition that "the alleged limiting effects of
8 [Plaintiff's] symptoms are questionable." (See AR 30.) He later
9 stated, "I find [Plaintiff] and his partner, Roger Kincaid, not
10 credible" (id.), a determination that Plaintiff has not disputed
11 (see J. Stip. at 4-13, 19-20). He then cited Dr. Haynes's
12 testimony that Plaintiff's stroke did not support "the alleged
13 limiting effects of [his] complaints, mental and otherwise" (AR
14 31) – testimony that Plaintiff's hearing counsel made no serious
15 effort to undermine (see AR 884) – and found that Plaintiff's
16 treating providers' "belief that [he] is not a malingerer" was
17 "inconsistent with the evidence of record" (AR 31).

18 Plaintiff has not disputed those findings, either. (See J.
19 Stip. at 4-13, 19-20.) His argument amounts to a request for an
20 "incantation" of "magic words" when none is required. See
21 Magallanes, 881 F.2d at 755; see also Gray v. Comm'r of Soc. Sec.
22 Admin., 365 F. App'x 60, 62 (9th Cir. 2010) (ALJ did not err in
23 declining to include plaintiff's claimed level of cognitive
24 limitation in RFC when doctors reported she gave poor effort on
25 IQ testing and he found her testimony not fully credible); Deleon
26 v. Astrue, No. 09cv2282-WQH (Wmc)., 2010 WL 3418425, at *5 (S.D.
27 Cal. July 30, 2010) (plaintiff's counsel's having chosen to
28 present "few or no questions" to medical expert on impairments at

1 issue on appeal weighed against finding of error), accepted by
2 2010 WL 3418423 (S.D. Cal. Aug. 26, 2010). It is therefore
3 without merit.

4 The ALJ's finding that Plaintiff's mental impairments were
5 not severe was thus supported by substantial evidence in the
6 record and free of the legal errors alleged by Plaintiff. Webb,
7 433 F.3d at 687.

8 b. *Any error in finding Plaintiff's cognitive*
9 *impairments not severe would have been*
10 *harmless*

11 As noted above, the step-two inquiry is "a de minimis
12 screening device to dispose of groundless claims" when a
13 claimant's impairments are not severe. Smolen, 80 F.3d at 1290.
14 When a claimant is found to have any severe impairment, the ALJ
15 is required to consider the functional effect of all his
16 impairments, both severe and nonsevere. See SSR 96-8p, 1996 WL
17 374184, at *5 (July 2, 1996) ("In assessing RFC, the adjudicator
18 must consider limitations and restrictions imposed by all of an
19 individual's impairments, even those that are not 'severe.'");
20 see also Gray, 365 F. App'x at 61 (no reversible error in ALJ's
21 step-two determination that certain impairments were nonsevere
22 when ALJ found other severe impairments and considered but
23 discredited nonsevere impairments at step five). In such
24 circumstances, any step-two error is harmless. See Lewis v.
25 Astrue, 498 F.3d 909, 911 (9th Cir. 2007) (as amended) (any step-
26 two error would be rendered harmless by ALJ's consideration of
27 nonsevere impairments at step four); Bickell v. Astrue, 343 F.
28 App'x 275, 278 (9th Cir. 2009) (same).

1 The ALJ found Plaintiff to have other severe impairments
2 (see AR 23) and expressly considered the "entire record" in
3 assessing his RFC (AR 24), including evidence of his mental
4 health provided not only by Drs. Donohue and Campbell but also
5 Dr. Moore and psychiatrists Khushro Unwalla and Han Nguyen, among
6 others (AR 26-29). He found at step two that Plaintiff had "mild
7 limitation" in the area of "concentration, persistence[, and]
8 pace" (AR 24), a finding that was apparently based in part on the
9 opinions of Drs. Donohue and Campbell (see AR 27-29 (citing
10 medical evidence from Drs. Han Nguyen, Matthew MacKay, Imelda
11 Alfonso, Jon Porter, Donohue, Campbell, and Unwalla)).¹³

12 Thus, the ALJ's determination as to the severity of
13 Plaintiff's mental condition had no effect on his obligation to
14 review and consider all evidence of record, which he did.¹⁴ (See
15 AR 24, 31 ("[a]lthough [Plaintiff's] alleged symptoms and
16 limitations are not entirely supported by the objective medical
17 evidence, I have considered them").) Accordingly, even had the

18
19 ¹³ Dr. Donohue assessed a "moderate" limitation in
20 maintaining "persistence and pace in a normal workplace setting"
21 but otherwise assessed no more than mild impairments. (AR 373-
22 74.) Dr. Campbell assessed moderate limits in "relating
23 appropriately to the public, supervisors, and coworkers" and in
withstanding "the stress and changes associated with an eight-
hour workday and day-to-day work activities." (AR 433.) She
otherwise found Plaintiff to have no more than mild limitations.
(AR 433.)

24 ¹⁴ Plaintiff does not argue that the ALJ erred at step two
25 by failing to give sufficient weight to any of the other medical
26 opinions in the record, some of which support greater
27 restrictions than do those of Drs. Campbell and Donohue. (See J.
28 Stip. at 5 n.2 (citing AR 88-94, 114-16, 368-76, 428-37, 508-14,
522-27).) To the contrary, Plaintiff has stipulated that "the
ALJ fairly and accurately summarized the medical and non-medical
evidence of record" except as to Drs. Donohue and Campbell. (See
id. at 4.)

1 ALJ erred at step two, any such error would have been harmless.

2 Plaintiff also contends that the ALJ erred by omitting the
3 mental limitations opined by Drs. Campbell and Donohue from his
4 RFC. (See J. Stip. at 10.) As discussed above, the ALJ did not
5 err in rejecting any mental limitations, but even if he had it
6 would not have provided grounds for reversal. At the hearing,
7 the VE testified that a hypothetical individual with Plaintiff's
8 physical limitations¹⁵ who was limited to "non-public, simple,
9 repetitive tasks with non-intense and superficial interaction
10 with others" could perform three unskilled sedentary jobs
11 existing in significant numbers in the national economy:
12 addresser (DOT 209.587-010, 1991 WL 671797 (Jan. 1, 2016)),
13 assembler (DOT 726.684-034, 1991 WL 679599 (Jan. 1, 2016)), and
14 document preparer (DOT 249.587-018, 1991 WL 672349 (Jan. 1,
15 2016)). (AR 59-60.)

16 Plaintiff argues that an RFC consistent with the
17 hypothetical that limited him to "simple repetitive tasks"
18 without significant interaction with others would not "adequately
19

20 ¹⁵ The physical limitations in the hypothetical are
21 actually more restrictive than those ultimately contained in
22 Plaintiff's RFC. (Compare AR 59-60 (hypothetical individual able
23 to "lift and/or carry 20 pounds occasionally and 10 pounds
24 frequently," "stand and/or walk for four-hours in an eight-hour
25 period with the use of a single pointed cane," "frequently
26 perform simple gripping and frequently perform distal fine
27 coordinating movements with the left . . . hand and fingers,"
28 occasionally "balance," "walk over uneven terrain," and "operate
foot controls with the left foot" but never "work at heights,"
"climb ladders, ropes, or scaffolds" or do "work requiring
excellent visual acuity"), with AR 24 (RFC finding that Plaintiff
"does not require a cane in order to stand or ambulate" and could
"occasionally climb" but never "climb ladders, ropes, or
scaffolds, or work at unprotected heights"; no restrictions on
visual acuity or use of left hand or fingers).)

1 address the limitations identified by Drs. Donohue and Campbell."
2 (J. Stip. at 12 n.3.) He cites several cases in support of the
3 proposition that impairment in "concentration, persistence, or
4 pace" or "interaction with coworkers" is insufficiently addressed
5 by an RFC assessing limitations to simple, repetitive tasks or
6 unskilled work. (See id.) But – crucially – in each of those
7 cases the ALJ found the plaintiff's mental impairments fully
8 credible. See Bagby v. Comm'r of Soc. Sec., 606 F. App'x 888,
9 890 (9th Cir. 2015) (citation omitted) (remanding because RFC
10 "failed to include all of [plaintiff's] credible limitations");
11 Brink v. Comm'r Soc. Sec. Admin, 343 F. App'x 211, 212 (9th Cir.
12 2009) (reversal warranted when ALJ "accepted medical evidence
13 that [plaintiff] ha[d] moderate difficulty maintaining
14 concentration, persistence, or pace" but hypothetical to VE
15 included only limitation to "simple, repetitive work"); Juarez v.
16 Colvin, No. CV 13-2506 RNB., 2014 WL 1155408, at *7 (C.D. Cal.
17 Mar. 20, 2014) (restriction to "simple tasks" did not adequately
18 reflect ALJ's "express[]" finding, "consistent with the opinion
19 of a state agency review physician," that plaintiff had "moderate
20 limitation in maintaining concentration, persistence, and pace").

21 Unlike in those cases, the ALJ did not find the degree of
22 Plaintiff's alleged cognitive impairments fully credible, a
23 finding that – as discussed above – was supported by substantial
24 evidence, including Drs. Donohue's and Campbell's own findings.
25 (See AR 373 (Dr. Donohue cautioning that "[Plaintiff] is showing
26 significant symptoms for an excess of what would be expected"
27 with his medical history), 432 (Dr. Campbell stating, "[t]his
28 test result is not considered to be a reliable estimation of

1 [Plaintiff's] cognitive or psychological functioning").)

2 The Ninth Circuit has made clear that an ALJ's assessment
3 limiting the plaintiff to simple tasks "adequately captures
4 restrictions related to concentration, persistence, or pace" when
5 it is "consistent with the restrictions identified in the medical
6 testimony." Stubbs-Danielson v. Astrue, 539 F.3d 1169, 1174 (9th
7 Cir. 2008). This is so even when the restrictions are "moderate"
8 rather than mild. See id. at 1173-74 ("moderate" mental
9 limitations adequately captured by restriction to "simple,"
10 "repetitive," "routine" work); see also McGarrah v. Colvin, 650
11 F. App'x 480, 481 (9th Cir. 2016) ("[Plaintiff's] RFC to perform
12 simple tasks adequately captured her moderate limitations";
13 finding that unskilled jobs listed in DOT met this standard).


14 The hypothetical posed to the VE met the applicable
15 standard. (See AR 59-60.) The three jobs listed are all
16 "unskilled," meaning that they "need[] little or no judgment to
17 do simple duties that can be learned on the job in a short period
18 of time." See § 416.968(a). Their descriptions in the DOT do
19 not mention interaction with the public, and none require
20 significant social skills of any kind. See DOT 209.587-010, 1991
21 WL 671797 ("Addresser"; "[p]eople" skills rated "[n]ot
22 [s]ignificant"); DOT 726.684-034, 1991 WL 679599 ("Assembler,
23 [s]emiconductor"; same); DOT 249.587-018, 1991 WL 672349
24 ("Document [p]reparer, [m]icrofilming"; same). Even if the ALJ
25 had fully credited the moderate limitations opined by Drs.
26 Donohue and Dr. Campbell – which he did not – and incorporated
27 them into Plaintiff's RFC, he still would have found him able to
28 perform the jobs identified in the VE's testimony, thereby

1 precluding a finding of disability. (See AR 60.) Any error on
2 this ground would therefore have been harmless. See Molina, 674
3 F.3d at 1111, 1115.

4 **VI. CONCLUSION**

5 Consistent with the foregoing and under sentence four of 42
6 U.S.C. § 405(g),¹⁶ IT IS ORDERED that judgment be entered
7 AFFIRMING the Commissioner's decision, DENYING Plaintiff's
8 request for remand, and GRANTING judgment in Defendant's favor.

9
10 DATED: October 1, 2018



JEAN ROSENBLUTH
U.S. Magistrate Judge

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27 ¹⁶ That sentence provides: "The [district] court shall have
28 power to enter, upon the pleadings and transcript of the record,
a judgment affirming, modifying, or reversing the decision of the
Commissioner of Social Security, with or without remanding the
cause for a rehearing."